

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRAVIS JOHN ANDERSON,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 270304

Delta Circuit Court

LC No. 05-007524-FH

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of assault with intent to do great bodily harm less than murder, MCL 750.84, and his sentence of 29 months to 10 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charge against defendant resulted from an incident in which defendant and Cory Ostrander attacked Gary Pratt. Ostrander held Pratt's arms while defendant punched him, and then they kicked him, stomped on him, and punched him more after he was tripped to the ground. Pratt sustained broken ribs and required stitches near his ear and eyebrow. At the time of trial, he continued to suffer from headaches and eye problems. Ostrander agreed to testify against defendant as part of an agreement that allowed him to plead guilty to a reduced charge.¹ Ostrander testified that he and defendant punched and kicked Pratt repeatedly and that Pratt did not provoke the attack. Ostrander denied that he intended to injure Pratt severely.

Defendant requested that the trial court instruct the jury on simple assault, MCL 750.81, as a lesser-included offense of assault with intent to do great bodily harm less than murder. The trial court declined to instruct the jury on the offense of simple assault on the ground that a rational view of the evidence did not support such an instruction.

At sentencing, the prosecutor requested that the trial court score Offense Variable (OV) 7, MCL 777.37, aggravated physical abuse, at 50 points on the ground that Pratt had been

¹ Ostrander pleaded guilty to attempted assault with intent to do great bodily harm less than murder.

subjected to excessive brutality during the attack. Defendant objected to the scoring of OV 7 at 50 points, arguing that the assault was short-lived and was more severe due to Ostrander's participation. The trial court scored OV 7 at 50 points, noting that the evidence showed that defendant was the leader of the assault, that shortly before Pratt was attacked, defendant attacked another person, and that the attack on Pratt lasted as long as 30 seconds and resulted in severe injuries, including a permanent diminution in vision. The revised sentencing guidelines recommended a minimum term range of 29 to 57 months. The trial court sentenced defendant to 29 months to ten years in prison, with credit for 170 days.

Defendant first argues that the trial court abused its discretion and committed reversible error by refusing to instruct the jury on the lesser offense of simple assault. Defendant contends that the evidence did not support a finding that he specifically intended to do great bodily harm to Pratt, so a rational view of the evidence supported an instruction on simple assault. We disagree. A requested instruction on a necessarily included lesser offense is only proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser-included offense and a rational view of the evidence would support the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Contrary to defendant's assertion, the direct and circumstantial evidence supported the trial court's ruling that the simple assault instruction was improper in this case. Defendant specifically directed his blows and kicks to Pratt's ribs and head. Defendant and Ostrander continued the beating after tripping Pratt to the ground and otherwise rendering him defenseless. The assault lasted for at least 30 seconds, permanently injured Pratt, and only stopped after defendant and Ostrander were informed that the police were en route to the scene. Clearly, defendant's conduct went far beyond giving Pratt the reasonable, but mistaken, impression that he was about to be punched, kicked, and otherwise battered. See *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Therefore, defendant's argument essentially distills down to whether the evidence was left open to the reasonable interpretation that defendant did not intend to do great bodily harm to Pratt. Given the circumstances, the trial court decided that the beating's severity and defendant's placement of his blows in vulnerable and vital areas of Pratt's body ran strongly contrary to a finding that defendant did not mean to hurt Pratt badly, and we see no abuse of discretion in this conclusion.² Therefore, the trial court did not abuse its discretion by determining that a rational view of the evidence contradicted the simple assault instruction. *Gillis, supra*.

² We note that adopting defendant's argument regarding the simple assault instruction would essentially turn *Cornell* on its head and require the trial court to provide a lesser-included instruction any time the defense can raise abstract skepticism about the differentiating element, no matter how remote or groundless. Instead, *Cornell, supra*, requires us, and trial courts, to take a rational view of the evidence, and *Gillis, supra*, provides trial courts the discretion to settle the issue.

Defendant next argues that the trial court abused its discretion by scoring OV 7 at 50 points and that he is entitled to resentencing. He asserts that even assuming that an assault with intent to do great bodily harm occurred, it occurred quickly and did not go beyond the level necessary to commit that offense. We disagree. “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision that is supported by record evidence. *Id.*

Offense Variable 7 provides that 50 points should be scored if a victim is treated with “excessive brutality.” MCL 777.37(1)(a). The statute does not define the term “excessive brutality.” However, we have previously upheld fifty-point scores for this variable and this offense when a prolonged and severe beating leaves serious lingering effects. See *People v Wilson*, 265 Mich App 386, 396-398; 695 NW2d 351 (2005). Similarly the stomping of a victim’s face and chest after the victim has lost consciousness, resulting in severe brain damage, supports a finding that excessive brutality occurred. *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005). Although the beating here was not as thorough as in those cases, the evidence still supports the trial court’s score. Defendant accosted Pratt without provocation or any cognizable purpose. Defendant rendered Pratt defenseless at the outset and then joined with his accomplice in repeatedly kicking him in the head and ribs. The sheer ruthlessness of the attack supports the trial court’s finding that defendant treated Pratt with excessive brutality. Therefore, the trial court did not abuse its discretion by scoring OV 7 at 50 points. *Hornsby, supra.*

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O’Connell